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IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Respondent,

vs.

JAMES KEMP,
Defendant and Appellant

STATEMENT AS TO JURISDICTION

The Supreme Court of the United States has appellate jurisdiction to review the final judgment of the Supreme Court of the State of South Dakota rendered herein on the 3rd day of October, 1950, pursuant to Paragraph 1257 (2), Title 28, United States Code Annotated, which provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . . (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The particular statute of the State of South Dakota, the validity of which is involved is subdivision (9), Chapter 91, South Dakota Laws of 1949, which provides:

> "No license shall be issued to a nonresident for the hunting, taking, or killing of any migratory waterfowl."

The Supreme Court of the State of South Dakota in its Judgment entered October 3, 1950, affirmed a Judgment of the Circuit Court of the Fourth Judicial Circuit within and for Brule County, South Dakota, against the Defendant and Appellant, James Kemp, from which Judgment of the above entitled Court the review of the Supreme Court of the United States is sought by petition for allowance of such appeal presented to the presiding Judge of the Supreme Court of the State of South Dakota on the 11th day of December, 1950.

"R" followed by an Arabic numeral will denote the page of the Settled Record to which reference is made, the Settled Record being the record of the case as submitted to the Supreme Court of South Dakota. In the proceedings in the trial court all of the facts were stipulated (R. 85-87). The Defendant, James Kemp, was a nonresident of the State of South Dakota and a citizen of the State of Wisconsin (R. 86). He was refused a license to hunt migratory waterfowl in the State of South Dakota solely on the ground of his having not resided in the State for a period of six months (R. 86). Thereafter the Defendant hunted and killed a wild goose, which is a migratory waterfowl, in the State of South Dakota (R. 86). He shot said goose on private premises, obtaining a license from the owner thereof entitling him to hunting rights thereon (R. 87). The Defendant had purchased and attached to his nonresident hunting license a Federal duck stamp for migratory waterfowl (R. 86). The Federal questions involved

herein were first raised in the Circuit Court of South Dakota of the Fourth Judicial Circuit within and for Brule County by Defendant's motion for judgment of acquittal after the parties stipulated as to the facts (R. 87-88). As shown by the opinion of the trial court the Federal questions sought to be reviewed were raised and argued in the trial court and passed upon by the trial court (R. 9-78). By its opinion duly filed the Circuit Court held the statute was valid and that the Defendant was guilty of the offense charged. Judgment and sentence of the Circuit Court pursuant to such opinion was duly entered and filed (R. 7-8). An appeal to the Supreme Court of the State of South Dakota was perfected where the questions of the validity of the statute were raised by assignment of errors (R. 2-3). Such assignment of errors asserts that the statute in question was contrary to and in conflict with the Constitution of the United States and violated and was in conflict with the treaties of the Congress of the United States regarding migratory waterfowl.

The Supreme Court of South Dakota in its opinion dated October 3, 1950, affirmed the judgment of the Circuit Court and sustained the validity of the statute, passing upon the federal questions sought to be reviewed. A copy of such opinion is hereunto annexed and by this reference made a part hereof.

As shown by the portions of the Record above cited, the Defendant contended in both the trial court and in the State Supreme Court that subdivision (9), Chapter 91, South Dakota Laws of 1949, was invalid in that (1) it violated the 1916 treaty made between the United States and Great Britain (39 U. S. Statutes at Large, 1702) and a similar treaty made in 1936 between the United States and Mexico (50 U. S. Statutes at Large, 1311) both relating to the regulation of migratory waterfowl; (2) the stat-

ute violated Article IV, Section 2, Constitution of the United States, which provides:

> "The citizens of each state shall be entitled to all of the privileges and immunities of citizens of the several states."

and (3) that the statute violates the Equal Protection and Due Process of Law Clause of the Fourteenth Amendment of the Constitution of the United States.

The Defendant's claim is that Subsection (9) of Chapter 91, South Dakota Laws of 1949 by providing for the designation of an exclusive right to hunt migratory waterfowl upon one class of individuals to the prejudice of other individuals who are citizens of the United States is contrary to the treaties between the United States and Mexico and Canada regarding migratory waterfowl, the purpose of which treaties are manifestly to protect migratory birds for the common benefit of all of the citizens of the United States.

It is further the claim of the Defendant that such statute is contrary to Article IV, Section 2 and to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that Subsection (9), Chapter 91, South Dakota Laws of 1949 necessarily discriminates against non-citizens of the State of South Dakota in requiring a six-months residence as prerequisite to obtaining a license to hunt migratory waterfowl in the State of South Dakota.

Lastly it is the contention of the Defendant that the statute deprives a landowner in the State of South Dakota of his property without due process of law in prohibiting his using the land for the purpose of allowing nonresident hunters the right to hunt and kill migratory waterfowl thereon.

By holding that Subdivision 9, Chapter 91, South Dakota Laws of 1949 was valid in the face of the contentions of the Defendant that such statute violated Article IV, Section 2 of the Constitution of the United States, the Equal Protection and Due Process of Law Clause of the Fourteenth Amendment to the United States Constitution and those treaties between the United States and Great Britain and Mexico regulating migratory waterfowl review by the Supreme Court of the United States pursuant to Paragraph 1257 (2), Title 28, United States Code Annotated, should be allowed, and the questions involved are substantial.

Cases believed to sustain the jurisdiction of the Supreme Court of the United States are as follows:

Toomer v. *Witsell,* 334 U. S. 385, 92 L. Ed. 1460, 68 S. Ct. 1156;

Takahashi v. *Fish and Game Commission,* 334 U. S. 410, 92 L. Ed. 1478, 68 S. Ct. 1138;

Missouri v. *Holland,* 252 U. S. 416, 64 L. Ed. 641, 40 S. Ct. 382.

Attached hereto are copies of the Opinion of the Circuit Court of the Fourth Judicial Circuit in and for Brule County, South Dakota, and of the Supreme Court of the State of South Dakota with reference to the matter as above entitled.

Dated this 11th day of December, 1950.

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APPENDIX "A"

IN THE CIRCUIT COURT OF SOUTH DAKOTA,
FOURTH JUDICIAL CIRCUIT WITHIN AND
FOR BRULE COUNTY, ss

STATE OF SOUTH DAKOTA, *Plaintiff*,

vs.

JAMES KEMP, *Defendant*

Memorandum of Decision

Appearances:

For the State: Donald J. Porter, Esq., State's Attorney, Edward D. Barron, Esq., Asst. Attorney General.

Attorney for Defendant: South Dakota Sportsmen's Clubs, Inc., as *Amicus Curiae;* John F. Lindley, Esq.; Robert D. Jones, Esq.; Fred A. Tinan, Esq.; Roy E. Willy, Esq.

The defendant, a citizen of Wisconsin and a nonresident of this state, during the open season for taking migratory waterfowl as provided by both the federal and state statutes and regulations, shot a goose, of the species *anatidae*, in Brule County, South Dakota, in violation of statutes of this state forbidding the shooting of such game by any person not the holder of a license from the state.

One of these statutes is Chap. 109, Session Laws of 1947, which provides:

> "No license shall be issued to a nonresident for the hunting, taking or killing of any migratory waterfowl."

The facts as stipulated are: that the defendant shot the goose in question on private premises, under a license from the owner entitling him to hunting rights thereon; that the defendant had a South Dakota license to shoot nonmigratory birds, and a federal migratory bird hunting stamp; that he had applied for the migratory water-

fowl stamp required by the state law, but that its issuance to him had been refused on the sole ground that he was a nonresident of the state and therefore not entitled to such stamp.

The case is before this Court on defendant's motion for the entry of a judgment of acquittal.

Defendant contends that such of our statutes as deny to a nonresident of this state the right to take such migratory waterfowl as are within the control of the federal government, violate numerous provisions of both the federal and state constitutions. These provisions are:

Art. 14, Sec. 1, Fed. Const., which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law * * *."

Art. 4, Sec. 2, Fed. Const., which provides:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The 5th Amendment to Fed. Const., which provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

Art. 1, Sec. 8, Fed. Const., which provides:

> "The congress shall have power: * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Art. VI, Sec. 18, State Const., which provides:

> "No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."

These contentions will be here considered and discussed collectively, on the assumption that all legal and fact questions and the constitutionality of such of our statutes as are involved have been put in issue in this proceeding. Defendant's contentions may be grouped under the following heads:

1. That because the statute denies equal shooting rights in migratory birds to nonresidents of the state, it encroaches upon the supposedly exclusive prerogatives of the federal government to regulate the shooting of migratory birds;

2. That citizens of the several states, even though nonresidents of this state, have a right guaranteed to them by the Federal Constitution to shoot migratory birds in this state;

3. That the right of hunting migratory birds on real estate is a property right of the owner, who also has a special, qualified ownership in the wild game thereon, and that such owner may exercise this right himself or grant it to others; that the statutory denial to a nonresident owner of land in this state of the right to exercise this privilege of ownership amounts to a taking of his property without due process of law, as does it also as to both resident and nonresident owners, through the fact that he cannot sell or otherwise grant his exclusive hunting rights in his land to a nonresident of the state.

While not asserted in the briefs filed by the State and the *amicus curiae*, other questions which have occurred to me will be discussed and determined. These are:

1. The extent to which the common law relating to the ownership of wild birds has been superseded by our statutes;

2. On the assumption that proprietary ownership of wild birds in the state does not exist, whether the presumption of good faith, propriety and necessity which attend legislative action are so unsupported by facts showing necessity for the exclusion of nonresidents as to deny fundamental rights of citizens of the several states because not justified as a proper, reasonable and necessary exercise of the state's police power;

3. Whether the statute involved which denies license to take migratory waterfowl to "nonresidents" affects "citizens" of any state; and

4. Whether the international treaties confer power on the states to do that which except for the treaty would violate the federal and state constitutions.

The power of the state to protect, regulate and control the wild game within its borders, both migratory and nonmigratory, including fish, whether free-swimming or not, and the right of the people to kill and take such game, has been the source of a vast amount of case law in both the state and federal courts, as well as the subject of extensive legislation by the states. The constitutionality of these regulatory acts, many of which deny to nonresidents of the state or of counties or even lesser governmental areas within the state, the rights of shooting and fishing or of transporting game taken into other states, has been questioned from every angle.

Of the cases where the state has legislated to deny nonresidents the right to take wild game, the earliest and most numerous relate only to fish, lobster, oysters, and shrimp taken commercially, and it should be here noted that at the common law the rule as to fish and upland game are to some extent different. Typical of these, and perhaps the most authoritative, is *McCready* v. *Virginia* (1876), 94 U. S. 391; 24 L. Ed. 248; which upheld the constitutionality of a statute of Virginia forbidding nonresidents to plant oysters in a tidal river in that state.

The Court considered its claimed impingement on Art. 4, Sec. 2, the equal privilege and immunity clause, and Art. 1, Sec. 8, the commerce clause, of the Federal Constitution, and determined it to be constitutional. The basis for the holding is that although the maritime states granted to the United States the right to regulate, in respect to foreign and interstate commerce, the paramount right of navigation of tidal water, no such grant was made of the state's power over the fisheries, which continued to remain under the exclusive control of the state as a common for taking and cultivating fish, and that the act of the state in forbidding the use of its fish by nonresidents is nothing more than a

regulation of the use by the people of their common property. The Court said that the right which the people of the state thus acquire comes not from their citizenship alone but from their citizenship and property combined, and is in fact a property right and not a mere privilege or immunity of citizenship.

The *McCready* case has ever since been considered the basic structure of the authorities upholding the right of the states to regulate the taking of wild game and fish by its people and to prohibit such taking by the people of other states. Until the case of *Toomer* v. *Witsell* (1948), 334 U. S. 385; 92 L. Ed. 1460, which will later be discussed, the ownership of wild game by the people of the state has never been questioned.

This was followed by *Geer* v. *State of Connecticut* (1896), 61 U. S. 519; 40 L. Ed. 793. The question there involved was whether a statute of Connecticut which among other things prohibited killing for the purpose of transportation, having in possession for transportation, or transporting from the state, of any upland game, bird or squirrel, violated the commerce clause of the Constitution.

The Court traced the development of the law of animals *ferae naturae* from the earliest Grecian, Roman and Salic laws into the common law of England and the American Colonies. It holds that the wild game within a state belongs to the people in their collective, sovereign capacity, and is not the subject of private ownership except as the people may elect to make it so; and that the legislature may, if it sees fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good. The Court held that to so prohibit was within the police power of the state, the source of which was the power to preserve for its people a valuable food supply, and that commerce between the states was so remotely affected as to be permissible. This may be considered the leading case in point as to wild birds as distinguished from fish.

Other decisions supporting the exclusive power of the state to regulate wild game within its borders are:

Manchester v. *Commonwealth of Massachusetts* (1891), 139 U. S. 240; 35 L. Ed. 159;
Ex parte Maier (Cal. 1894), 42 Am. St. Rep. 129, 37 Pac. 402;
Magner v. *People*, 97 Ill. 333;
Haavik v. *Alaska Packers' Assn.* (1924), 236 U. S. 510; 68 L. Ed. 414;
Organ v. *State* (Ark.), 19 S. W. 840;
Anderson v. *Smith* (1934), 71 Fed. (2d) 493;
Peters v. *State* (Tenn.), 33 L. R. A. 114;
Re Eberlee (1899), 98 Fed. 295 (C. C. A.);
Lawton v. *Steele* (N. Y.), 16 Am. St. Rep. 813;
Cummins v. *People* (Ill., 1904), 71 N. E. 1031;
State v. *Theriault* (Vt.), 43 L. R. A. 290; 67 Am. St. Rep. 695; 41 Atl. 1030;
State v. *Ashman* (Tenn., 1910), 135 S. W. 325;
Connecticut v. *Hilton* (Mass., 1910), 54 N. E. 362; 45 L. R. A. 475;
State v. *Kofines* (R. I., 1911), 80 Atl. 432; Ann. Cas. 1913 C. 1120;
State v. *Setunsky* (Mich., 1910), 126 N. W. 844;
Blake v. *McClung*, 172 U. S. 239; 43 L. Ed. 432;
State v. *Leavitt* (Me., 1909), 72 Atl. 875; 26 L. R. A. (N. S.) 799;
Selz v. *Hesterberg* (N. Y.), 76 N. E. 1032; 3 L. R. A. (N. S.) 163;
Chambers Bros. v. *Church* (R. I., 1897), 51 Am. Rep. 410;
Allen v. *Wycoff* (N. J., 1886), 57 Am. Rep. 548.

These cases confirm the rule of sovereign ownership in the state, as declared in *Geer* v. *Connecticut*, and the exclusiveness of the state's control of such wild game and fish under the police power. Those which involve fish, oysters, clams and lobsters, should be recognized as dealing with the commercial rather than the sporting aspect of fishing, a difference which from the standpoint of fundamental constitutional rights must be kept in mind. Indi-

vidually and collectively they assert the power of the state to forbid fishing by nonresidents; and those which involve the hunting of wild birds fully support the right of the state to refuse licenses to nonresidents, and, of course, to discriminate in license fees. Typical of these holdings is *State* v. *Setunsky, supra,* in which it was said:

> "That the legislature has power to regulate the taking of fish and game within the confines of the state, and the waters that it owns, is unquestionable, not only as to time and place, but as to method. * * *
>
> "The right of the state to exclude nonresidents altogether from fishing privileges in its waters is recognized by the following cases: (Citing McCready *v.* Virginia, supra; Geer *vs.* Connecticut, supra; and Blake *v.* McClung, supra)."

Patsone v. *Pennsylvania* (1913), 232 U. S. 138; 58 L. Ed. 539, posed the validity of a Pennsylvania statute which prohibited aliens from killing any wild bird or animal and from owning or possessing a shotgun or rifle. This is the only federal decision involving complete exclusion by a state. The Court held that the statute did not violate the due process clause of the 14th Amendment.

I have not included among the cases supporting the exclusive right of the state to regulate the taking of wild game even to the extent of excluding nonresidents, the case of *State* v. *Mallory* (Ark., 1904), 83 S. W. 955; 67 L. R. A. 773. On this case the defendant places much reliance. It involved the right of a nonresident owner of real estate in Arkansas to take wild game and fish on his own land, despite a state statute denying to nonresidents the right to hunt, fish or trap in the state. The Court said:

> "We therefore conceive it to be settled by authority and by long recognition in the law that the owner of land has a right to take fish and wild game upon his own land, which inheres in him by reason of his ownership of the soil. It is a property right, as much as any other distinct right incident to his ownership of

> the soil. It is not, however, an unqualified and absolute right, but is bounded by these limitations: That it must always yield to the state's ownership and title, held for the purposes of regulation and preservation for the public use. These two ownerships or rights—that is to say, the general ownership of the state for one purpose, and the qualified or limited ownership of the individual, growing out of his ownership of the soil—are entirely consistent with each other, and in no wise conflict. The transitory nature of the property renders the benefits so diffusive that all may join in the enjoyment thereof, and for that reason the sovereign holds as the representative of the public, so as to regulate and protect the common use. Still the right of the landowner to hunt and fish on his own lands is to that extent a special property right, though subordinate to the other."

and, on the theory that the right to hunt and fish on his own land is a special property right possessed by the owner, held the statute under consideration to violate the 14th Amendment.

The Court as then constituted comprised five Judges. Two of them dissented, and Chief Justice Hill wrote a dissenting opinion. In this he took sharp issue with the majority of the Court, and although his opinion was based on the identical authorities relied upon by the Court, he arrived at an opposite conclusion. He said that one who takes game had originally no separate property in it, and no right to acquire it except as the legislature might provide, and that as all property in such game is derived from the state, it is subject to such terms as the legislature imposes. He says that this power of regulation is placed upon its only true basis, the right of ownership of the fish and game in the state, and it matters not where it is found, except reclaimed game in parks and fish in private ponds which have a property right impressed in them by being reduced to personal possessions and are no longer *ferae naturae*.

This decision is based wholly on the common law, and illustrates the impossibility of reconciling the authorities,

both British and American, which have attempted to apply the law of England to the various situations arising in the United States. At the common law and in the absence of statute, the courts have frequently recognized a property right of the owner in both fish and game. These decisions are discussed in considerable detail in the *Mallory* case. The opinion says:

> "But nowhere do we find that in modern times has the absolute and unqualified ownership of such animals by government been asserted and exercised further than for the purposes of controlling and regulating the taking of the same."

This seems to be the point on which the whole case turns, for the Court then says:

> "By the common law of England the owner of land had no absolute property in animals ferae naturae while at liberty in the wild state, but had a qualified interest or property in such as were found, and so long as they remained, on his territory, and, when killed or captured thereon, became his absolute property."

The Court quotes Blackstone as follows:

> "Yet he (Blackstone) recognized the right or privilege of one to take game or fish on his own premises without restraint as a substantial and valuable one. 2B 1. Com. 418, 419."

The case of *Payne* v. *Sheets* (Vt.), 55 Atl. 656, seems to have controlled the Court's decision in this case. It is perhaps as good a modern exposition of the pure common law as relates to ownership by a landowner of the wild game on his premises, as any of the reported cases. It clearly distinguishes this property right when not attached to other land from an easement. It was dealing with a hunting right which had been granted by the owner to another, and it holds that the right granted to such other was a right of profit in the land and therefore an interest

in the land itself. I am disposed to agree that the law as laid down in this case correctly expresses the common-law rule, and the fact that the same Court had previously, in *State* v. *Theriault*, 43 L. R. A. 290, 67 Am. St. Rep. 695, 41 Atl. 1030, apparently fully recognized the power of the state to regulate the taking of wild game and fish, makes the *Payne* v. *Sheets* case additionally authoritative.

In the absence of statute at common law, it is probably true that the owner of land had a qualified ownership in game which arises from his ownership of the land, but I think the common-law rule does not and never did apply in this state.

Our territorial existence began with an act of congress of March 2, 1861, which organized the Territory of Dakota. The first legislative assembly convened at Yankton in March, 1862. It passed a system of laws which was amended from time to time and under which the territorial government was maintained until 1866. On January 12th of that year the territorial assembly adopted the so-called Field Codes (Gardner, Foreword to the 1939 Code, p. 3). Sec. 6 of the Field Civil Code, as adopted, provided:

> "In this territory there is no common law in any case where the law is declared by the codes."

The codes, reference to which I will make as they appear unchanged in the 1939 statutes, covered the ownership of property.

SDC 51.0202 provides:

> "All property in this state has an owner, whether that owner is the United States or the state, and the property public; or the owner an individual, and the property private."

SDC 51.0201 provides:

> "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.

"There may be ownership of all inanimate things which are capable of *appropriation* or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good will of a business, trade-marks, and signs, and of rights created or granted by statute.

"Animals, wild by nature, are the subjects of ownership (only) when tamed or taken and held in possession, or disabled and immediately pursued."

SDC 51.0204 provides:

"The state is the owner of all property lawfully appropriated or dedicated to its own use, *and of all property of which there is no other owner.*" (Emphasis supplied.)

These statutes were in force prior to any extensive acquisition in the territory of any vested rights in real property. Although I do not consider that any right of private or qualified ownership in wild game would have vested even if these statutory provisions had not antedated private title to South Dakota real estate, the clear effect of our statutes was to abrogate and abolish the common law of ownership of animals, wild by nature, and to exclude private ownership of such animals except when tamed or taken and held in possession, or disabled and immediately pursued.

Since our statute provides that all property in the state has an owner, and, in effect, repudiates ownership of wild creatures, animals or birds, in individuals, the necessary result is that unless the state appropriated ownership under 51.0204, an appropriation sanctioned by 51.0201 if exercised by the state because there was no other owner of wild game, its ownership would be merely that of a sovereign power for purposes of protection and regulation, as would seem to be the case in Arkansas. But SDC 25.0401, which came into our statutes as Chap. 159, Laws of 1907, is a legislative declaration that:

"All wild birds, both resident and migratory, in this state shall be and are hereby declared to be the property of the state."

What the legislature did by this statute was to exercise a power it has had since 1866, when, as a territory, it adopted the provision of the Field Civil Code which provided that the state is the owner of all property of which there is no other owner, or which was capable of and is actually appropriated by it, and that as to all public property, the ownership is in either the state or the United States, but never in the individual.

My investigation discloses no decision of any state or of the United States where the effect of statutes such as ours has been applied in limitation of the common-law rule recognizing a special qualified or servient ownership of game in an owner of real property, but I am convinced that such is the effect of our statute; particularly where that ownership is proprietary as distinguished from sovereign, as I construe the ownership of this state to be.

In *Missouri* v. *Holland*, 252 U. S. 416, 64 L. Ed. 641, Mr. Justice Holmes, in commenting on Missouri's claim to ownership of migratory birds, said:

> "The state, as we have intimated, founds its claim of exclusive authority upon an assertion of title to migratory birds,—an assertion that is embodied in statute."

In that case it was held, of course, that the authority of the state is not exclusive of the paramount power of federal authority—and concededly it is not—but, although the question of ownership as between the state and the nation was there involved, the decision does not question the validity of state ownership as against that of the individual resident or landowner.

But we are not, however, without authority recognizing the right of a state to declare its ownership of property which is without private ownership, and thus appropriate it, for the right of a state to appropriate the tidal lands below high-water mark in navigable streams has been upheld by the United States Supreme Court in the case of

Shively v. *Bowlby*, 152 U. S. 1; 38 L. Ed. 331, wherein it was said:

> "The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tidal waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another." See *Eisenbach* v. *Hatfield* (Wash.), 26 Pac. 539; 12 L. R. A. 632.

Shively v. *Bowlby, supra*, upheld the right of the state to grant the land below the high-water mark in the Columbia River as against grantees of the upland who claimed to the low-water mark under grants from the federal government. The point is that by this decision and the numerous authorities therein cited, the federal government has permitted each state to determine for itself the ownership of these tidal lands, and this because there was no private ownership therein.

The same doctrine is equally applicable to the ownership of wild game. In the absence of a claim by the state through its legislature to the proprietary ownership of such game, the authorities universally recognize a sovereign, as distinguished from a proprietary, ownership. Under a sovereign ownership by the state, the state's title or ownership is deemed to be one in which it holds the title in such birds in trust for its people, who share equally in the right to take such game. But a proprietary ownership is quite another and different thing, as it vests in the state such absolute and unqualified ownership in game as entitles it to grant special and exclusive hunting and fishing privileges therein. Our state has claimed a proprietary ownership, just as the states of Washington and Oregon have claimed a proprietary ownership in these tidal

waters. If proprietary ownership in real estate by the state is supportable, there can be little question of the state's right to declare that kind of ownership in wild game.

In Mr. Justice Frankfurter's dissent in *United States* v. *California*, 332 U. S. 19; 91 L. Ed. 1889, he said:

> "Let us assume, for the present, that ownership by California cannot be proven. On a fair analysis of all the evidence bearing on ownership, then, this area is, I believe, to be deemed unclaimed land, and the determination to claim it on the part of the United States is a political decision not for this Court. • • • If California is found to have no title, and this area is regarded as unclaimed land, I have no doubt that the President and the Congress between them could make it part of the national domain and thereby bring it under Art. 4, Sec. 3, of the Constitution. The disposition of the area, the rights to be created in it, the rights heretofore claimed in it through usage that might be respected though it fall short of prescription, all raise appropriate questions of policy, questions of accommodation, for the determination of which Congress and not this Court is the appropriate agency."

While this expression is not that of the majority of the Court, neither does it conflict with any rule of law stated therein. I think it correctly describes a power which the federal government has and which, I think, the state likewise has as to unclaimed and unowned property within its territorial boundaries. In this case, as between the state and the owners of real property therein, I cannot doubt the right of the State of South Dakota to appropriate proprietary ownership in the wild game in this state, or that the effect of SDC 25.0401 is to do just that. What it might assert as against the United States is a question not here involved.

SDC 51.0601 provides that certain land burdens or servitudes upon land may be attached to other land as incidents

or appurtenances, and are then called easements. Among these rights is the right of fishing and the right of taking game. The next section, SDC 51.0602, provides that the right of fishing and taking game, as a burden or servitude upon land, may be granted and held though not attached to land. This is, of course, legislative recognition that the right of fishing and hunting is an incident of ownership and, in effect, an estate or interest in land (*State* v. *Finnerud*, 51 S. D. 106, 212 N. W. 497), but it declares no right to shoot birds belonging to the state.

The common-law decisions relied upon by the Court in the *Mallory* case quite generally recognize that, since the right to hunt or fish on land is a property right, the animals, birds and fish on that land are impressed with a limited or qualified special property right of the owner, or of one to whom the owner in fee has granted the privilege of taking such game as may be on the land. This is because the common law deemed the game as being a product of the soil a *prendre ratione soli.*

Adverting to statutes, we do not question that as between individuals the owner of real estate has the exclusive right to hunt and fish on his property if he chooses to exercise it, and, as well, the right to grant to the owner of other real estate, as an easement, such exclusive right of hunting and fishing. Also he may transfer such exclusive rights to one to be exercised and enjoyed without attachment to any other property. But there is nothing in this statute which goes further than to recognize hunting and fishing rights on real estate as between individuals. During an open season, and under such conditions as the state may provide, the one who holds the right to hunt on a particular landholding, may shoot the birds which is permissible. It is necessary to determine in this case fish, the statue was, as to him, violative of the 14th Amend- the state owns, and may exclude others from the privilege. In the absence of state consent, such hunting or fishing rights as result from ownership of land may not be exercised, nor has the legislature of this state recognized that the naked ownership of real estate confers any preferen-

tial hunting rights. SDC 25.0308, as amended by Chap. 92, Laws of 1943, provides:

> "A resident of this state may hunt or take in a lawful manner game birds or fish during an open season on land or waters on land *occupied by him* without first securing a license so to do."

The effect of this statute is to require the non-occupying owner of land to secure a license to do that which a non-owning occupant may do without a license, and it applies alike to both residents and nonresidents of the state.

The federal authority has, by Sec. 718 a, Title 16, U. S. C. A., also chosen to ignore naked ownership of land as conferring the right to take migratory birds without license by providing that:

> "No such stamp shall be required for the killing of migratory waterfowl * * * by the *resident owner,* tenant, or share cropper of the property, when found injuring crops or other property. * * *"

Whether "resident owner" as here used means an owner who is a resident of the state or only an owner residing on the land is not entirely clear, but whatever it means, it makes the same discrimination against nonoccupying owners as does our statute.

Without considering the propriety of our statute as it relates to fishing in private waters, but considering it only in its application to game birds, it must be construed as disregarding ownership by both residents and nonresidents of the state as determinative of the right to take game on their property. For the reason that this game is exclusively owned by the state, its failure to recognize ownership in the land as ownership of the wild birds thereon is permissible. It is unnecessary to determine in this case whether its authority in this respect extends to fish which if in a lake or pond on privately-owned property, probably belong to the owner, and have certainly not been and I think cannot be appropriated by the state.

The *Mallory* case dealt with a statute which prohibited any person who is a nonresident of Arkansas to shoot, hunt, fish or trap at any season of the year. The evidence shows that the defendant fished in a lake entirely surrounded by his land. He, of course, owned the land under the lake, and, therefore, the fish. He also shot, or at least hunted squirrels on his own land, and these he did not own. Because I think he had a right in Arkansas to take these fish, the statute was, as to him, violative of the 14th Amendment, but the case certainly is not an authority in South Dakota as to the right of a nonresident of this state to shoot game birds, and, as nearly as I can determine from my research, the *Mallory* case has not been followed or recognized by any other court.

So much for the power of the states to regulate wild birds prior to the treaties with other nations for the conservation of migratory birds, and the enactment of the federal statutes and promulgation of the regulations designed to carry out the obligations of the federal government under such treaties.

Up to this time the power and right of South Dakota to regulate the wild game within its borders cannot be questioned. It occupied the field of game conservation exclusively. Under its police power it could forbid any taking of such game by either residents or nonresidents. If it permitted the taking of its game, it could condition its permission as it chose, even to forbidding exportation of the game or its possession within the state after the expiration of a fixed period. It still owns and controls nonmigratory fowl, but the federal government has assumed an authority over migratory birds, the extent of which is probably determinative of this case.

The first attempt by the federal government to protect migratory game and insectivorous birds was an act of March 4, 1913, shown as Sec. 8837 in the U. S. Compiled Statutes of 1916. This was held to be unconstitutional. *State* v. *McCullogh* (Kansas), 153 Pac. 557, 11 A. L. R. 980; *United States* v. *Shauver* (1914), 214 Fed. 154 (S. C.); *United States* v. *McCullogh* (1915), 221 Fed. 288 (S. C.); *State* v. *Sawyer* (Me., 1915), L. R. A. 1915 F. 1031, 94 Atl.

886, Ann. Cas. 1917 S. 650; *United States* v. *Selkirk* (1919), 258 Fed. 775 (C. C. A.).

Subsequently, and on August 16, 1916, a treaty for the protection of migratory fowl was concluded with Great Britain. This was proclaimed by the President on December 8th of that year, and on July 3, 1918 a statute was passed by Congress to give effect thereto. This statute was held valid in: *United States* v. *Thompson* (1919), 258 Fed. 257; *United States* v. *Selkirk* (1919), 258 Fed. 775 (C. C. A.); *United States* v. *Rockefeller* (1919), 260 Fed. 346 (C. C. A.); *United States* v. *Samples* (1919), 258 Fed. 479 (C. C. A.).

Later, and on February 7, 1936, a similar convention was entered into with the United Mexican States, and still later with the countries comprising the Pan-American Union, but prior thereto the validity of the statute of July 3, 1918 was upheld in *Missouri* v. *Holland* (1920), 252 U. S. 416, 64 L. Ed. 641, 40 Sup. Ct. 1921, 11 A. L. R. 984.

The theory under which the 1913 act had been held unconstitutional prior to the treaty with Great Britain was that all wild game was owned by the states in their sovereign capacity for the benefit of their people, which, except as state statutes such as ours, was the common law, and that such control by the states was never delegated to the United States, but under the 10th Amendment was reserved to the states whose control could not be displaced by Congress.

In *Missouri* v. *Holland*, Mr. Chief Justice Holmes, who delivered the opinion of the Court, in justifying federal control of migratory birds, said:

> "It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. * * * The treaty in question does not contravene any prohibitory words to be found in the Con-

stitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the 10th Amendment. * * * Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the state, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and of our crops are destroyed. It is not sufficient to rely upon the states. * * * We are of opinion that the treaty and statute must be upheld."

Prior to Holland, the United States Supreme Court had decided a case emanating from South Dakota: *Carey v. State of South Dakota* (1919), 250 U. S. 118, 63 L. Ed. 886. Carey, a resident of this state, had been convicted of shipping wild ducks to a point outside the state, contrary to Chap. 240, Sec. 29, Session Laws of 1909. These birds had been lawfully killed during a time permitted by the federal act of 1913, and the shipment charged to have been unlawful was in November of 1915. His appeal to the State Supreme Court resulted in affirmance of his conviction, 39 S. D. 524, 165 N. W. 539.

In the United States Supreme Court it was contended that by the 1913 act, Congress assumed exclusive jurisdiction over this class of migratory birds, and that the failure of the federal act to make any provision forbidding the shipping of such birds evidences a purpose of Congress that the shipping of game birds should not be prohibited. The Court said that such argument rests upon the clause which declares that migratory birds, "shall hereafter be deemed to be within the custody and protection of the Government of the United States," and held that the foregoing clause may not be read without its context, and that the words immediately following show that such federal custody and protection is limited to prohibiting their be-

ing, "destroyed or taken contrary to regulations" which are to fix the closed season in the several zones. It was further said:

> "If, reading the Federal act as a whole, there were room for doubt, two established rules of construction would lead us to resolve the doubt in favor of sustaining the validity of the state law. First: The intent to supersede the exercise by a state of its police powers is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. Savage *v.* Jones, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715; Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 623, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488. Second: Where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other of which its constitutionality would be doubtful, the former construction should be adopted. Harriman *v.* Interstate Commerce Commission, 211 U. S. 407, 422, 53 L. ed. 253, 264, 29 Sup. Ct. Rep. 115; Knights Templars' & M. Life Indemnity Co. *vs.* Jarman, 187 U. S. 197, 205, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108."

With this test of the 1913 act as to the exclusiveness of federal control measured as it is by the treaty, we should examine the present federal statutes and such of the regulations of the Department of the Interior promulgated under such statutory authority as have to do with the regulatory power of the state as to migratory birds.

Section 703, Title 16, USCA, provides:

> "Unless and except as permitted by regulations made as hereinafter provided in sections 703-710 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import,

cause to be shipped, exported or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such birds, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936."

Sec. 704, Title 16, USCA, provides:

"Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President."

Sec. 701, Title 16, USCA, defines the duties and powers of the Department of the Interior as including the preservation, distribution, introduction and restoration of game birds and other wild birds, and authorizes the Secretary of the Interior to adopt such measures as may be necessary to carry out the purposes of such section and to purchase such game birds and other wild birds as may be required therefor, *subject, however, to the laws of the various states and territories.* The section further provides:

"The object and purpose of this section * * * is to aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct, and also to regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed."

Sec. 705, Title 16, USCA, makes it unlawful to ship, transport or carry, by any means whatever, from one state, territory, or district to or through another state, territory, or district, or to or through a foreign country, any bird, or any part, nest, or egg thereof, captured, killed, taken, shipped, transported or carried at any time contrary to the laws of the state, territory, or district in which it was captured, killed or taken or from which it was shipped, transported or carried, or to import into the United States from Mexico or to export from the United States to Mexico any game mammal, dead or alive, or parts or products thereof, except under permit or authorization of the Secretary of the Interior, in accordance with such regulations as he shall prescribe, having due regard to the laws of the United Mexican States relating to the exportation and importation of such mammals, parts or products thereof and the laws of the state, district or territory of the United States from or into which such mammals, parts or products thereof, are proposed to be exported or imported.

Sec. 715, Title 16, USCA, provides that sections 715-715r of Title 16 shall be known by the short title of "Migratory Bird Conservation Act." This section provides for a Migratory Bird Conservation Commission, and the purchase or rental by it of areas of land to be used as inviolate sanctuaries for migratory birds.

Sec. 715h, Title 16, USCA, provides:

"Nothing in sections 715-715r of this title is intended to interfere with the operation of the game laws of the several states applying to migratory game birds *in so far as they do not permit what is forbidden by Federal law.*" (Emphasis added.)

Section 718a, Title 16, USCA which is the only provision of the Migratory Bird Conservation Act which authorizes the taking of migratory waterfowl, provides:

> "No person over sixteen years of age shall take any migratory waterfowl unless at the time of such taking he carries on his person an unexpired Federal migratory-bird hunting stamp validated by his signature written by himself in ink across the face of the stamp prior to his taking such birds; except that no such stamp shall be required for the taking of migratory waterfowl by Federal or State institutions or official agencies, or for propagation, or by the resident owner, tenant, or share cropper of the property or official designated agencies of the Department of the Interior for the killing, under such restrictions as the Secretary of the Interior may by regulation prescribe, of such waterfowl when found injuring crops or other property."

Sec. 718c, Title 16, USCA, provides that nothing in Sections 718-718h of Title 16 shall be construed to:

> "Exempt any person from complying with the game laws of the several states."

Certain of the regulations promulgated by the Department of the Interior should be considered. In the regulations promulgated by Proclamation No. 2345, August 11, 1939, as amended by Proc. No. 2367, September 28, 1939, and Proc. No. 2420, August 9, 1940, Regulation 4, which regulates the taking of certain types of waterfowl, provides that:

> "No such birds shall be possessed in a State, or Territory, or in the District of Columbia, at a time when such State, Territory, or District prohibits the possession thereof."

Regulation 6 provides that:

> "Migratory game birds * * * may be transported in or out of the State where taken during the respec-

tive open seasons in that State * * * and may be possessed in any State, Territory, or District during the period constituting the open season where taken, and for an additional period of 20 days next succeeding said open season; * * * but no such birds or parts thereof shall be transported from any State or Territory or the District of Columbia to or through another State or Territory or the District of Columbia * * * *contrary to the laws of the State* (emphasis added) or Territory or the District of Columbia in which they were taken or from which they are transported; nor shall any such birds or parts thereof be transported into any State or Territory or the District of Columbia from another State or Territory or District of Columbia, * * * at a time when any such State, Territory, District * * * into which they are transported, prohibits the possession or transportation thereof."

Regulation 10, which relates to permits to kill migratory birds injurious to property, requires:

"That in every permit issued as aforesaid, it shall be specified that no such birds shall be shot at or killed at any time or in any manner not authorized by the laws of the State in which such permit is effective; * * *"

Regulation 12, as amended by Proc. No. 2801, July 29, 1948, dealing with permits to take migratory birds, provides that:

"Nothing * * * shall be construed to permit the taking, possession, sale, purchase, or transportation of migratory birds, * * * contrary to the laws and regulations of any State or Territory or the District of Columbia, made for the purpose of giving further protection to migratory birds, * * * when such laws and regulations are not inconsistent with the conventions between the United States and any other country for the protection of migratory birds or with the Migratory Bird Treaty Act and do not extend

the open seasons for such birds beyond the dates prescribed by this part."

Presently the migratory bird conventions are No. 628 with Great Britain, No. 912 with Mexico, and No. 981 with Bolivia, Cuba, the Dominican Republic, Ecuador, El Salvador, Nicaragua, Peru, Venezuela, Costa Rica, Mexico, Uruguay, Brazil, Colombia, Chile, Guatemala, Hayti, and Argentina. These conventions agree on a closed season on migratory birds from March 10th to September 1st, with certain designated exceptions, and an open season of not to exceed three and one-half months.

The purpose and scope of the convention between the United States and Great Britain is shown in the Proclamation by the President of its adoption, which recites in its preamble:

"Whereas, Many species of birds in the course of their annual migrations traverse certain parts of the United States and the Dominion of Canada; and

"Whereas, Many of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops, in both the United States and Canada, but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds;

"* * * (The High Contracting Powers), being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects and to the end of concluding a convention for this purpose have appointed as their respective Plenipotentiaries: * * *"

In the treaty with Great Britain—and this is true also of that with Mexico—international traffic is prohibited in birds captured, killed, taken, or shipped contrary to the

laws of the state or province in which so taken or killed. The other conventions follow the same general plan of conservation and protection.

The treaties, the statutes, and the regulations considered together disclose no international or federal policy to do more than did the original federal act (March 4, 1913, 37 Stat. at L. 828, 847), which was construed in *State* v. *Carey*, 250 U. S. 118, 63 L. Ed. 887, as not conferring exclusive jurisdiction on the federal government.

I construe these so-called conventions as being the type and character of international agreements referred to in the Federal Constitution as treaties, *Holmes* v. *Jennison*, 39 U. S. (14 Pet.) 540, 571; 10 L. Ed. 579, 618, and therefore being like the Federal Constitution the supreme law of the land.

The subject of treaties and their effect as relates to congressional and legislative acts, and federal and state constitutions, is exhaustively treated in annotations in 4 A. L. R. 1377 and 134 A. L. R. 882.

I conclude that our statute forbidding nonresidents of the state to take migratory birds in this state intrudes on no presently asserted or appropriated federal jurisdiction over such birds.

Except for this treaty, the federal government would be without power to regulate or conserve migratory birds (*State* v. *McCullogh, supra*, and *Missouri* vs. *Holland, supra*). The original act of 1913 was held unconstitutional as violating the 10th Amendment as to the reserved powers of the states, but was held constitutional in *Missouri* v. *Holland*, under Art. 2, Sec. 2, Fed. Const., which confers the treaty-making power on Congress. Here the Court said:

> "If the treaty is valid, there can be no dispute about the validity of the statute."

The treaty with Great Britain does more than construe the federal powers, which I take to be limited to the conservation and protection of migratory birds, for it limits these powers. It covenants that the states and provinces of the "High Contracting Powers" shall have an unlimited

although not exclusive power to prohibit the capture, killing, taking, or shipping of migratory birds, and, as well, agrees that there may be no international traffic in any game taken in violation of such laws (Art. VI, Convention between the United States and Great Britain, Treaty Series No. 628). The assertion in this treaty of state power to regulate the taking of game is in negative form and must be construed as reserving to the "High Contracting Powers" the right to further restrict such killing or taking, but to the extent that the state or province may restrict shooting, there is no limitation, even though the federal and dominion governments might legislate or regulate to broaden the shooting privilege.

As applied to our statute which denies to nonresidents the right to take migratory fowl in this state, if the federal government chose to legislate that nonresidents should have equal shooting privileges with residents, a state statute forbidding the exercise of such privilege would take precedence, although if the state granted the right and the federal government forbade it, the state enactment would have to yield to the federal. This construction results from the negative form of the phrasing in the treaty.

If the powers covenanted to the states had been conferred by federal or state statute instead of international treaty, the validity of the grant would be gauged by applicable provisions of the state and federal constitutions, but, springing as it does from the covenants of an international treaty which by its very making has attained the dignity of supreme law, it is not subject to the infirmity of unconstitutionality, but is valid as a constituent part of such treaty.

I see no constitutional question involved in this case.

I have previously cited *McCready* v. *Virginia* (1876), 94 U. S. 391, 24 L. Ed. 238, as holding that the ownership of wild game and fish is in the people of the state. This decision has been universally recognized by both federal and state courts for some 72 years and until *Toomer* v. *Witsell* (1948), 334 U. S. 385, 92 L. Ed. 1460. This case involved a Carolina statute regulating the commercial taking of migratory shrimp in the marginal sea off the South

Carolina coast within the three-mile limit. The Supreme Court held that the statute offended the commerce clause and also violated Art. 4, Sec. 2, the privileges and immunities clause.

McCready v. *Virginia* was discussed and differentiated from the case at bar because the former dealt with nonmigratory oysters in inland waters, while the latter affected migratory shrimp in the marginal sea. The *McCready* case held that the right of Virginians in Virginia waters to exclude nonresidents from fishing rights was "a property right and not a mere privilege or immunity of citizenship," but *Toomer* v. *Witsell*, on the theory that migratory fish were not the property of the state or its people while in the marginal sea, holds that neither the 13 original colonies nor their successor states separately acquired "ownership of the three-mile belt."

Of course, if the state does not own the land under the marginal sea, it cannot be deemed to own migrating shrimp, which, to paraphrase the language of Mr. Justice Holmes in *Missouri* v. *Holland, supra*, as to migratory birds—which Mr. Justice Vinson did in *Toomer* v. *Witsell:* "Yesterday had not arrived, tomorrow may be in another state, and in a week a thousand miles away."

The decision in this case was apparently influenced by another case decided at the same term, *United States* v. *California* (1947), 332 U. S. 19, 91 L. Ed. 1889, 67 Sup. Ct. 1658, in which the Court held that the state is not the owner of the land lying off the coast of California in a three-mile belt seaward from ordinary low-water mark. This case did great violence to the decisions of *Manchester* v. *Massachusetts*, 139 U. S. 240, 35 L. Ed. 159, 11 Sup. Ct. 559; and to *Pollard* v. *Hagan*, 3 How. 212, 11 L. Ed. 565; *Martin* v. *Waddell*, 16 Pet. 367, 410, 10 L. Ed. 997, 1012, and other earlier decisions of both the federal and state courts in which ownership of the land under the coastal waters was held to be in the state.

The reasoning of *Toomer* v. *Witsell* as to the ownership of fish in waters in which the state has no ownership is entirely consistent with *United States* v. *California*. Absent ownership of the land under the marginal sea off the coast

of South Carolina, the reasoning of the *McCready* case that the right of a state to exclude nonresidents from the right to take its fish in such waters is "a property right and not a mere privilege or immunity of citizenship," is no longer tenable. The clear effect of the decision is to leave in the maritime states no control over fishing in coastal waters sufficient to exclude nonresidents simply and alone because of their nonresidence, although it does hold that within constitutional limitations it may exercise its police power to protect and regulate fisheries within the three-mile limit. As the Court in *Toomer* v. *Witsell* says:

> "We would be closing our eyes to reality we believe, if we conclude that there was a reasonable relationship between the danger represented by noncitizens as a class and the severe discrimination practiced upon them."

The right of the citizen which was adjudicated in *Toomer* v. *Witsell* was the right to engage in the business or calling of commercial shrimping as a means of gaining a livelihood, and the place where this calling was being followed was in water over land owned by the federal government.

In *Truax* v. *Raich* (1915), 239 U. S. 33, 60 L. Ed. 131, was involved in Arizona statute which limited the rights of aliens to employment in private enterprise. The question was whether the act assailed was repugnant to the 14th Amendment. The Court said that the due process and equal protection clauses of the amendment are universal in their application to all persons within the territorial jurisdiction without regard to any differences of race or color or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws, and that the Arizona statute violated the amendment. It, however, recognized that the discrimination defined by and forbidden in the act has certain exceptions because of "special public interest," and that the discrimination defined and prohibited does not pertain to the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states, and the Court said:

"Thus in McCready *v.* Virginia (supra) the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the state, and an analogous principle was involved in Patsone *v.* Pennsylvania (supra), where the discrimination against aliens upheld by the court had for its object the protection of wild game within the states, with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property * * *; and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise."

The Court also said that:

"It is sought to justify this act as an exercise of the power of the state to * * * promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful residents, because of their race or nationality, *the ordinary means of earning a livelihood* (emphasis added). * * * The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government. * * * The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work."

In *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, L. Ed. 1478—decided on the same day as *Toomer* v. *Witsell*—the Court had under consideration a California

statute forbidding the issuance of commercial fishing licenses to all aliens not entitled to be naturalized. This statute the Court interpreted as forbidding Takahashi "from earning his living as a commercial fisherman in the ocean waters off the coast of California." It was contended that this statute violated the equal protection clause of the 14th Amendment, and the Court sustained this contention as against the claim of California that the statute is within the rationale of the "special public interest" cases recognized in *Truax* v. *Raich, supra.* The decision is grounded on the *Truax* case, which the Court says fully sustains their conclusion.

The Court discusses *McCready* v. *Virginia, Toomer* v. *Witsell, Geer* v. *Connecticut, Patsone* v. *Pennsylvania,* and *Missouri* v. *Holland,* all of which have been previously and in this opinion referred to, and the opinion concludes with this statement:

> " 'To put the claim of the State upon title is to lean upon a slender reed.' We think that same statement is equally applicable here. To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens *who are lawful residents of the state* from making a living by fishing in the ocean off its shores while permitting all others to do so."

If this is intended to mean that the State of California does not own the fish in the three-mile belt seaward from high-water mark, and that it may not exclude nonresidents from taking them even commercially, it is a statement as weak as it says is the reed on which the state's claim of title leans. Incidentally, this is the third time state title has been questioned in like words by the Supreme Court without actual denial of its existence. Here the Court does not say that these fish are incapable of ownership by California or that they are not so owned. Nor does it even hold that the state might not lawfully exclude nonresidents, alien or otherwise, from fishing privileges in them. It even inferentially concedes that the exclusion

may apply to those who make a living by fishing in the ocean if they be nonresidents of the state. All it holds is that the exclusion may not be directed to state residents who are aliens while permitting other residents to do so; that aliens have equal rights to engage in fishing as a common calling or means of livelihood with citizens—a conclusion which does not here concern us. Exclusive powers of the congress to regulate the admission and naturalization of aliens, and conventions with other nations under the treaty-making power conferring express rights on aliens residing in the United States, may, and have invested them with the right to engage in commerce for their livelihood. The decision in this case merely denies the state's right to deprive aliens within the state of those means of livelihood.

The decision of the Supreme Court of California in the same case, *Takahashi* vs. *Fish & Game Commission* (Cal.), 185 Pac. 2d 805, which, except as it relates to aliens, was not criticized in the Supreme Court, I refer to as the latest authority on the modern law of state ownership in fish and wild birds and the right of control thereof even to the extent of conferring exclusive rights of hunting and fishing on its own citizens and denying that privilege to citizens of other states.

It should be observed that California has amended these original provisions of the Field Code as originally adopted and which we have retained.

Sec. 669, Civil Code, provides:

> "All property has an owner, whether that owner is the state, and the property public, or the owner an individual, and the property private. The state may also hold property as a private proprietor."

Sec. 670, Civil Code, provides:

> "The state is the owner of all land below tide-water, and below ordinary high-water mark, bordering upon tide-water within the state; of all land below the water of a navigable lake or stream; of all property lawfully appropriated by it to its own use; of all property

dedicated to the state; and of all property of which there is no other owner."

Sec. 656, Civil Code, provides:

"Animals wild by nature are the subjects of ownership, while living, only when on the land of the person claiming them, or when tamed, or taken and held in possession, or disabled and immediately pursued."

I know of no statutory claim by California to the ownership of wild game by the state. Any such statute would necessarily contravene Sec. 656 which recognizes ownership of such game by owners of land while the game is thereon. The case law of California as disclosed in the State Supreme Court decision in *Takahashi* (*supra*) is therefore enlightening.

These two decisions, *Toomer* v. *Witsell* and *United States* v. *California,* have worked a drastic change in the Court's former concept of the ownership both of the land under the marginal sea and of the free-swimming and sometimes migratory fish found therein, notwithstanding the nullifying effect of the *Takahashi* case on *Toomer* v. *Witsell.* Both are now deemed the property of the federal government, and, at least as to commercial fishing, no right of control remains in the state to prohibit such fishing to nonresidents or aliens. In the view I take of it, the power is also wanting to regulate noncommercial fishing in these marginal waters. They are beyond the territorial jurisdiction of the maritime states. How can the state impose its regulatory measures on land beyond the limits of an ownership which does not reach seaward beyond the low-water mark, and over that which is not its property?

We are here, of course, not concerned with the regulation of fish in the sea, and it is only because of the impact of these decisions on the theory of state ownership, either severeign or proprietary, of upland game that I have considered these cases at all. In none of them has the power of the state to exercise at least a subservient control of migratory waterfowl been denied, and in only one, *Toomer* v. *Witsell,* is any language to be found questioning

the ownership of upland game, and then only as to migratory birds.

As I have previously noted, the case law of America in both the federal and state courts has predicated the right of state control on ownership. *Toomer* v. *Witsell* finds its authority for the nonownership of the states in upland game in *Missouri* v. *Holland, supra,* from which they quote Mr. Justice Holmes as saying that:

> "To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone, and possession is the beginning of ownership."

An examination of this decision will disclose that the only ownership which Justice Holmes was considering was the ownership of an individual state as against a collective ownership by all the states. Justice Holmes followed the quoted statement upon which *Toomer* v. *Witsell* places so much reliance, by saying:

> "No doubt it is true that, as between a state and its inhabitants, the state may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. * * * The whole foundation of the states's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another state, and in a week a thousand miles away."

No one contends that South Dakota owns a bird then in Nebraska because on its way from North Dakota it had stopped for a time in this state, but there is nothing in *Missouri* v. *Holland* which says that because of a migrating habit which may take it from Mexico to Canada through all the intervening states, title to such bird is not in South Dakota while it is within our borders, and the treaties and migratory game statutes contemplate that such ownership does exist.

We are not considering ownership of migratory birds in the same sense as applies to ordinary private personal

property, nor was Justice Holmes. For all practical purposes, the state owns migratory birds while in the state, and holds title thereto either in its sovereign capacity in trust for the people of the state, or proprietarily, during the only time in the course of their flight that the state is concerned with ownership. Whether the ownership is sovereign or proprietary is immaterial as concerns the power of the federal government which Justice Holmes affirmed, and never is except when ownership is claimed by an individual. To deny state ownership because wild birds are in possession of no one and possession is the beginning of ownership, imposes a test which applies only to private property. Our statutes, SDC 51.0202 and 51.0204, control as to this by providing that "all property in this state has an owner, whether that owner is the United States or the state, and the property public;" and that the state owns all property of which there is no other owner.

Every rule of legal construction requires more than a fragmentary quotation from this decision, if it is to serve as authority for abandoning a principle of law as ancient as the one that game within the confines of a sovereignty belong to the people of that sovereignty; a principle embedded in Roman, Grecian and Salic law since the beginning of recorded history; a principle recognized by the common law of England and its American colonies, and solemnly pronounced by the Court itself and the courts of most of the states (*Geer* v. *Connecticut, supra, Takahashi* v. *Fish & Game Commission,* 185 Pac. 2d 805).

What I have just said has no real relevancy to the question of the power of our legislature to regulate and preserve migratory waterfowl, subject to the paramount powers of the federal government. That right is evidenced by the conventions and federal statutes and regulations elsewhere discussed, all of which express a federal purpose to do no more than protect and conserve these birds as sources of food and as efficient destroyers of injurious insects. That to a limited and controlled extent, some of them must be killed and taken is most evident. Subject to the paramount federal powers, this taking is subject to

the regulatory control of the states, just as it was before federal control.

I think this case might be decided on the point of state ownership alone as in *McCready* v. *Virginia, supra,* but I prefer to dispose of the other constitutional questions which I consider involved.

Defendant's contentions of unconstitutionality assume that by this act the legislature has discriminated against the citizens of other states. Let us consider what the statutes do in fact say and mean. The prohibition is found in SDC 25.0306, as amended by Chap. 91, Laws of 1949, which provides that the issuance of hunting licenses shall be subject to the following restrictions: 1) No *resident* license shall be granted unless the applicant has been a *bona fide* resident of this state for at least six months prior to the meaking of the application; 2) A *nonresident* or *visitor's* license shall be granted only to a person whose residence is not such as to qualify him for a resident license; 9) No license shall be issued to a nonresident for the hunting, taking or killing of any migratory waterfowl.

It will be observed that the particular class of license to be issued, or whether any license whatever shall be issued is not dependent on citizenship. To be a citizen of South Dakota requires one year's residence, but any person who in good faith has resided in this state for six months is entitled to a resident license although he has not yet become a citizen of this state.

Whether a citizen of the state who has not also been a resident thereof for six months next preceding is entitled to a nonresident license to shoot migratory birds depends on the construction to be given subd. (9). The source of this subd. (9) as it now appears in Chap. 91, Laws of 1949, is Chap. 109, Laws of 1947, which added a subd. (9) to the eight subdivisions of Chap. 106, Laws of 1941, which was itself an amendment of SDC 25.0306. The title of the 1947 act describes it as amending the existing statutes, and the act itself recites that the previous statutes shall "be amended by adding a new subdivision number (9)

reading as follows: 'No license shall be issued to a nonresident for the hunting, killing or taking of any nonmigratory waterfowl.' "

Unless this term "nonresident" takes a different meaning from the 1941 act to which it was annexed, it means one who does not reside in the state. A "resident" is one who resides or dwells in a place for some time.

If the term "resident" is defined in the previous subdivisions of the act, it is in (1), (2), or (8). Subd. (1) limits resident licenses to *bona fide* residents of the state for at least six months, which by specifying a required period of residence and a good faith in its acquisition, necessarily assumes that there may be "residence" in the absence thereof. Subd. (2) refers to a nonresident license as one to be granted where either good faith or period of residence is insufficint. Subd. (8) authorizes licenses to take fur-bearing animals to persons "who shall have *lived* in the state at least six months."

None of these provisions seem to control the meaning of "nonresidents" as that term appears in Subd. (9). Vol. 5, Words and Phrases, Perm. Ed., defines "domicile" as a matter of intention, but says, "residence" is a physical fact, while "bona fide residence" means residence with domiciliary intent.

The legislature doubtless intended to exclude from migratory waterfowl shooting those who are not *bona fide* residents for the six months next preceding application. Whether this statute accomplishes that result need not concern us here, and I shall assume that the act has the effect of denying such right to nonresidents, including nonresident citizens of the state.

The statute then must be construed by its own expressed terms as applying no test of citizenship, but as dealing with citizens of South Dakota and the other states alike.

The terms "citizen," "resident," "bona fide resident," and "actual bona fide resident," as well as the term "inhabitant," have been variously and extensively defined by the courts. See Words and Phrases, Perm. Ed., under the foregoing headings.

In *United States* v. *Cruikshank*, 92 U. S. 542, 23 L. Ed. 588, it was said:

> "Citizens are members of the political community to which they belong. They are the people who compose the community and who in their associated capacity have established or submitted themselves to the dominion of a government for the promotion of their welfare and the protection of their individual as well as their collective rights."

In *Ullman* v. *State* (Tex.), 28 Am. Rep. 405, a citizen is defined in these words:

> "He is a dweller in a place; a resident; one who dwells or resides permanently in a place; one who has a fixed and permanent abode in a place. 'Resident' and 'inhabitant' mean the same thing, but 'citizen' and 'resident' are not synonymous. The Latin "habitara' imports by its very construction, frequency, contingency, permanency, closeness of connection and attachment, both physical and moral, and the word 'in' serves to give additional force."
>
> "The word 'resident' and 'citizen' are not synonymous." *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U. S. 60, 64 L. Ed. 460, 40 Sup. Ct. 228.
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> "'Citizen of state' means a citizen of the United States whose domicile is in such state." *Prowd* v. *Gore* (Cal.), 207 Pac. 490.
>
> "A statute imposing inheritance tax on devises to organizations 'located' without the state, or to organizations 'located' within the state for use without the state is not violative of Art. 4, Sec. 2, guaranteeing to 'citizens' of each state the same privileges and immunities as 'citizens' of other states." *San Jacinto National Bank* v. *Sheppard* (Tex.), 125 S. W. 715, 717.
>
> "'Citizenship' and 'domicile' are synonymous with respect to jurisdiction of federal courts, and 'domicile' in its common meaning is residence at a particular place plus the intention of remaining at that place permanently or for an indefinite length of

time." *Shreveport Long Leaf Lumber Co.* v. *Wilson*, 38 F. Supp. 629, 631.

"'State citizenship' for purpose of conferring jurisdiction on federal court in diversity of citizenship cases, and residence in a judicial district for venue purposes, are not synonymous terms." *Townsend* v. *Bucyrus-Erie Co.* (C. C. A., Okla.), 144 F. 2d 106, 108.

In *La Tourette* v. *McMasters*, 248 U. S. 465, 63 L. Ed. 362, 39 Sup. Ct. 160, where a South Carolina statute providing for the licensing of insurance brokers required that the licensee be a resident of the state and have been licensed as an insurance agent therein for at least two years, the plaintiff, a citizen of the State of New York, contended that the act abridged his privileges and immunities as a citizen of the United States. The Court held that the effect of the statute was to apply as well to citizens of South Carolina as to citizens of other states, and that it did not conflict with either the 14th Amendment or Art. 4, Sec. 2, the discrimination clause.

This decisive was followed by *Maxwell* v. *Bugbee*, 250 U. S. 525, 63 L. Ed. 1124, 40 Sup. Ct. 2, involving the validity of the New Jersey inheritance tax law which assumed to impose tax on the estates of nonresident decedents. The Court held that a difference disadvantageous to the estate of James J. Hill, a resident in his lifetime of the state of Minnesota, due to the method of taxation provided by the New Jersey statute, rests upon residence and not upon citizenship, and that the alleged discrimination, so far as privileges and immunities of citizenship are concerned, is not strictly applicable to the statute.

In *Douglas* v. *New York, New Haven and Hartford Railroad Co.*, 279 U. S. 377, 73 L. Ed. 747, the Court had under consideration a statute which authorized the state courts, in their discretion, to dismiss actions by nonresidents of New York, but which statute did not so authorize as to a suit by a resident of the state. As against the contention that the statute violated Art. 4, Sec. 2, the Court, speaking through Mr. Justice Holmes, held that the statute applied

alike to citizens of New York and other states, and put them on the same footing; that there is no discrimination between citizens as such, and none between nonresidents, and that a distinction of privilege according to residence may be based upon rational considerations, and that this principle had been previously upheld by the Court, in which the difference between citizenship and residence was emphasized.

A much-quoted authority on the interpretation to be given Art. 4, Sec. 2, is the case of *Blake* v. *McClung* (1898), 172 U. S. 239, 43 L. Ed. 432, in which it is said that the United States Supreme Court has never undertaken to give any exact or comprehensive definition of the words "privileges and immunities" in Art. 4 of the Constitution of the United States. In the *McClung* case, Mr. Justice Curtis is quoted as having said in *Conner* v. *Elliott*, 18 How. 591, 15 L. Ed. 497:

> "We do not deem it needful to attempt to define the meaning of the word 'privileges' in this clause of the Constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning, to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters, not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and failure to make it so would certainly produce mischief."

The *McClung* case also quotes from Mr. Justice Washington in *Corfield* v. *Coryell*, in a case involving the validity of a statute of New Jersey regulating the taking of oysters and shells on banks or beds within that state, and which excluded inhabitants and residents of other states from the privilege of taking or gathering clams, oysters, or shells on any of the rivers, bays or waters in New Jersey not wholly owned by some person residing in the state, and in which the statute was sustained upon the ground that it only regulated the use of the common property of the

citizens of New Jersey which could not be enjoyed by others without the tacit consent or the express permission of the sovereign having the power to regulate its use. The Court said:

> "The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the law may prescribe."

The quotation from Justice Washington is:

> "The inquiry is, What are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the

state,—may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise as regulated and established by the laws or Constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state in every other state was manifestly calculated * * * 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.'"

This interpretation was approved by our Supreme Court in *State* v. *Scougal*, 3 S. D. 55, 51 N. W. 858.

Blake v. *McClung*, 43 L. Ed. 432, held that a Tennessee statute which gave residents of Tennessee a priority over nonresidents in the distribution of assets of a foreign corporation doing business in that state, violated Art. 4, Sec. 2. In so holding, the Court said:

"We must not be understood as saying that a citizen of one state is entitled to enjoy in another state *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the state. For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a nonresident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time be-

fore a citizen of another state who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states. The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the people of the United States, by and for whom the government of the Union was ordained and established."

Mr. Justice Brewer, who, with Chief Justice Fuller, dissented, thought the statute did not discriminate because it did not purport to prefer "citizens" of Tennessee, but only "residents" thereof. He said:

"So that neither the statute, the pleadings, nor the decree raise any question of citizenship, or give any priority of right to citizens of Tennessee over citizens of other states, but only discriminate between residents, and give residents of the state a priority. I think it improper to go outside of a case to find a question which is not in the record simply because it may be discussed by counsel for one party, who apparently decline to recognize any difference between residence and citizenship. For all this record discloses, the plaintiffs in error other than the corporation may have been citizens of the state of Tennessee, temporarily residing and doing business in Ohio, and the controversy one simply between citizens of the same state. It is not necessary in this court to refer to the difference between residence and citizenship. Neither is synonymous with the other and neither includes the other. A British subject or a citizen of Ohio may be a resi-

dent of Tennessee, and entitled to the benefit of this statute. A citizen of Tennessee may, like these plaintiffs in error, be a resident of and doing business in Ohio and not entitled to its benefit. It will be time enough to consider the question discussed in the opinion when it appears that a state has attempted to discriminate between its own citizens and citizens of other states, and the courts of the state have affirmed the validity of such discrimination."

The Supreme Court later, and incidentally later than *La Tourette* v. *McMasters, supra,* held in *Travis* v. *Yale & Towne Manufacturing Co.* (1919), 252 U. S. 60, 64 L. Ed. 460, that a New York statute which denies to all nonresidents without special reference to citizensship certain exemptions from income tax which it accorded to residents, was invalid. The Court said:

"Of course the terms 'resident' and 'citizen' are not synonymous, and in some cases the distinction is important (La Tourette *v.* McMasters * * *); but a general taxing scheme such as the one under consideration, if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other states; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled."

"* * * This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer, but a general rule, operating to the disadvantage of all nonresidents, including those who are citizens of the neighboring states, *and favoring all residents, including those who are citizens of the taxing state* (emphasis added)."

The fact that this statute was found to favor citizens of New York over citizens of the several states seems to have been the point of difference from *La Tourette* v. *McMasters,* for there the Court said that it was the effect of the statute there considered that it applies as well to the

citizens of South Carolina as to the citizens of other states. The Court said further that:

> "But our conclusion is not rested upon the mere use of the word 'residents;' for no doubt it might appear from the purpose and scope of an act that 'residents' was used in the sense of 'citizens.' If so, the court would so construe it; and in no event would the court sanction an evasion of the purpose and intent of this wise and wholesome provision of the constitution, based on mere verbiage. But there is nothing in the act to suggest any such intention. On the contrary, the words 'residents' and 'citizens' are both used, each apparently in its ordinary legal sense, which is well defined and understood, making a distinction which is substantial in its purpose and one that is sanctioned by the highest judicial authority."

Another case after *La Tourette* v. *McMasters, supra*, is *Chalker* v. *B. & N. W. Ry. Co.* (1919), 249 U. S. 522, 63 L. Ed. 748. This involved the question of whether a Tennessee statute providing a higher license tax on a person engaged in railway construction work who has his chief office outside the state than on one having his chief office within the state, violated Art. 4, Sec. 2. This statute did not use the term "resident," "nonresident," or "citizen," but based its differentiation on the terms "foreign" and "domestic" as applied to the construction company and the location of its chief office in or out of the state as determining its foreign or domestic character.

The United States Supreme Court refused to follow the decision of the State Supreme Court, which said that the determining feature in the legislation is the having of one's chief office in the state, and that any citizen of this state as well as any citizen of a foreign state who has his chief office out of the state, must pay the tax of $100, so of any domestic corporation, as well as foreign corporation having its chief office out of the state, and that any foreign corporation or citizen of another state, or firm, as well as domestic corporation, citizen of this state and firm of this state having its or their chief office in this state, are

all alike entitled to carry on a railroad construction business in Tennessee on the payment of $25.00.

The Court expressed the belief that the chief office of an individual is commonly in the state of which he is a citizen, and that practically the statute would discriminate against citizens of other states. The Court said that a classification on the basis of the location of its principal office was "arbitrary and unreasonable, and was not an adequate basis for taxation of individuals; that under the Federal Constitution a citizen of one state is guaranteed the right to enjoy in all other states equality of commercial privileges with their citizens, but he cannot have his chief office in every one of them."

These cases exemplify the wisdom of the rule laid down by Mr. Justice Curtis before quoted. The effect of a statute may not be controlled by its form or terminology alone, but only by determining in each case the "particular rights asserted or denied therein."

What may appear to be a wide divergence in the law as laid down in the decisions just discussed does not exist. There is a clear difference. All dealt with more than the right to engage in the sport of migratory waterfowl hunting which has no commercial aspect whatsoever. *Maxwell* v. *Bugbee*, *Chalker* v. *Ry. Co.*, and *Travis* v. *Yale & Towne*, all involved tax statutes. *Blake* v. *McClung* dealt with preferment of creditors in commerce. None construed a statute passed in exercise of the police power, except *La Tourette* v. *McMasters*, and as it concerned a statute relating to and regulating the calling or business of insurance brokerage, it, too, had a commercial aspect. Taxation, or revenue-raising statutes in the garb of license laws, or statutes which affect property or the fundamental right to earn a livelihood, directly affect commerce, and less discrimination is permissible in legislation by the states than in laws which go no farther than to discriminate as to pastimes and sports, such as shooting birds, the right to the possession of which after being killed may lawfully be denied to him who shoots it.

I have not yet come to *Toomer* v. *Witsell* in our consideration of the terminology of the statute there held to violate

Art. 4, Sec. 2. It, like ours, is the prohibition of equal rights in "nonresidents" in that case to take shrimp. It patently deals with commercial fishing for profit. The briefs, of course, do not disclose that any point was made of the fact that it was the "nonresident" and not the "citizen" who was described in the statute, and this the Court confirms by saying:

> "Nor do they argue that since the statute is couched in terms of residence it is outside the scope of the privileges and immunities clause, which speaks of citizens. Such an argument, we agree, would be without force in this case."

Here again we have under consideration a statute regulating a means of livelihood and an engagement in commerce. In fact, the act was not only interpreted as one regulating commercial fishing, but certain provisions of it were held to offend the commerce clause of the Federal Constitution.

That there may be a denial of equality of privileges between citizens of one state and those of the several states requires no citation of authority. The right to hold office, to sell intoxicating liquor, to sue in the courts on the same terms as citizens, to vote—these and many others are rights peculiar to citizenship. Some of these rights closely approach the fundamental rights which all citizens are guaranteed by the Constitution. Included in those rights which the state may deny to noncitizens is the right to hunt and fish, noncommercially but as a sport, on equal terms with its citizens.

I consider these authorities as fully supporting the constitutionality of the statute in controversy. It is a statute excluding all except actual residents of South Dakota, including such of its citizens as have not been in residence in the state during the six months immediately preceding application for license. In so doing, it necessarily excludes citizens of the several states as it does some of its own citizens, but this exclusion does not violate the discrimination clause of the Federal Constitution because it does not make citizenship a test of eligibility, and treats the

citizens of the several states on a basis of equality with those of this state.

I have construed the statute as requiring an applicant for resident license to be a *bona fide* resident of this state for at least six months *immediately preceding application.* That is a broad construction, but one which I think is proper if the statute is to be workable, for if the state does not require this period of residence to immediately precede the application, it would entitle all persons, without regard to present residence, who had ever been *bona fide* residents of the state for as much as six months, to a resident hunting license, and this, obviously, could not have been the legislative intent.

Whether any exclusionary regulation by a state can survive the acid test of Art. 4, Sec. 2, Fed. Const., where not otherwise warranted, depends on its reasonableness. There must be some logical reason to support a state legislative act which discriminates against nonresidents as a class, including necessarily those who are citizens of other states (*Travis* v. *Yale & Towne, supra*). The exclusion from privilege of a class of persons is not justified unless there is some particular evil which would result were that class not excluded.

The act itself presumes its propriety and necessity, but where its impact with the Federal Constitution is in question, legislative good faith, or absence thereof, may be the turning point as to its constitutionality. This was demonstrated in *Toomer* v. *Witsell, supra.* No evidence other than is found in the stipulated facts was adduced, and none of this relates to the legislative reason or purpose of enacting this law. The Court may, however, take judicial notice of existing conditions which seem to justify the law.

The state is in a natural flyway for migratory waterfowl, and is also a breeding ground and nursery for such game. Periodic drouth conditions greatly affect the sloughs, ponds, and small lakes, most of which are located in the eastern third of the state. There are few natural lakes in which the water is sufficient to maintain waterfowl during the breeding or nesting season, or to attract them during flight. The sloughs, ponds and small lakes which, because

then filled with water and also because of their size, were meandered in the government survey, are the only waters in the state, except the Missouri River, which are public, and as such adaptable to the use of hunters. The others, except those acquired by the state, are the subject of private ownership, and hunting rights thereon are controlled by the owners.

The state, by the expenditure of hunting-license funds, has acquired ownership of some private waters, and opened them to the use of hunters, and has diverted water into them and impounded it with dams, and also set aside areas for the propagation of birds. The state has introduced pheasants, partridge, quail, and other birds, and these, together with the native grouse, deer and elk, attract hunters from every state in the Union and foreign country, in such numbers as to make South Dakota one of the most attractive and resorted to hunting areas in the United States.

The result is that the number of potential hunters of migratory fowl has been greatly increased, as has it also because of the close proximity of Minneapolis, St. Paul, Omaha, and Kansas City, not to mention Chicago and other cities. This patronage is the principal source of the state's problem as to the ducks for thousands of nonresident pheasant hunters are thus attracted to our ducks and geese. Wealthy sportsmen and large corporations desiring facilities for entertaining their executives and customers have entered the state and acquired extensive exclusive hunting privileges in the private marshes, sloughs and ponds, to the extent that the availability of hunting for residents is seriously threatened. It has become a case of duck hunting until noon and bird hunting in the afternoon for these visitors. Also, excessive hunting has the effect of driving out the birds and discouraging their return to ancestral breeding grounds.

These, and other equally important facts, are known to every resident of the state, including the members of the legislature.

In my statement of those facts I express no feeling of my own, for I personally and individually am not in accord

with the legislative idea which prompted this enactment, as I consider absolute exclusion unnecessary to accomplish the result sought by the act. A very limited season for nonresidents, with a drastically reduced bag limit, would have accomplished the same result with less dissatisfaction to all concerned and better public relations with our neighboring states, and would have enabled us who are residents to discharge our personal obligations of hospitality to our out-of-state friends. But this was for the legislature to decide, and some control was vitally necessary. That the method employed and the statute enacted could have taken a different form does not render this one unreasonable and unnecessary, and therefore invalid.

From all of the facts and the law as I view it, I conclude:

1. The state is the proprietary owner of all wild birds in this state, and no resident or citizen as such has any ownership therein.

2. The ownership of real estate does not confer upon its owner any ownership in the wild birds thereon, even such as is special and qualified.

3. If the federal government has authority to appropriate ownership of migratory birds, it has not done so.

4. By virtue of its ownership of wild birds, including while they are in this state such as are migratory, the state may lawfully prohibit all shooting or taking thereof, or, if it grants permission, may condition and restrict the privilege as it chooses, even to the extent of retaining its title to the birds after being lawfully taken, prohibiting their export from the state or their possession in the state, and may deny to nonresidents or citizens of other states a right in such birds or in their taking which is accorded to its own citizens or residents.

5. The only power vested in the federal authority over wild birds in this state is that conferred by the International Migratory Bird treaties over migratory birds, which is limited to their preservaton, distributon, introduction and restoration.

6. The power of the state over nonmigratory birds is entirely unaffected by the treaties, but as to migratory

birds, the power of the state to permit their destruction is limited by the paramount right of protection which is in the federal authority, while, conversely, the right of the latter authority does not extend beyond protection and conservation and the control incident thereto; and, to the extent that this paramount authority permits such birds to be taken, the state's ownership of the birds with the same full right of control which it has over nonmigratory birds exists as it did before the treaty.

7. The treaties are, with the Federal Constitution, the supreme law of the land and are subject to no informity of unconstitutionality and confer full power on the state to exclude nonresidents from hunting privileges in migratory birds.

8. Since the laws of both nation and state so restrict the taking and use of migratory birds as to exclude all commerce therein, the hunting of them is not a common calling to be followed as a means of livelihood, and is therefore not a fundamental right of a United States citizen, the denial of which violates the equal privileges clause of the Federal Constitution.

9. Even did the statute deny a fundamental right of federal citizenship, it does not offend the equal privileges and immunities clauses, because by its terms it makes nonresidence rather than noncitizenship the test of shooting privileges and permits noncitizen residents to do that which may not be done by nonresident citizens, and in so doing is a reasonable exercise of police power.

10. The statute denying to nonresidents the right to shoot migratory birds in this state is reasonable and necessary and justified as an exercise of the police power of the state to conserve its property for its citizens.

11. The statute is valid, and the defendant is guilty as charged.

Dated at Plankinton, South Dakota, this 10th day of February, 1950.

R. C. Bakewell,
Judge of the Fourth Judicial Circuit.

#9168-a-HBR

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, *Plaintiff and Respondent,*

vs.

JAMES KEMP, *Defendant and Appellant*

APPEAL FROM THE CIRCUIT COURT OF BRULE COUNTY, SOUTH DAKOTA

HON. R. C. BAKEWELL, *Judge*

Opinion Filed October 3, 1950

Number 9168

John F. Lindley, Chamberlain, South Dakota, Davenport, Evans, Hurwitz & Smith, Sioux Falls, South Dakota, Attorneys for Defendant and Appellant.

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Appearing for South Dakota Sportsmen's Clubs, Inc., Robert D. Jones, Milbank, South Dakota, Fred A. Tinan, Mitchell, South Dakota, Roy E. Willy, Sioux Falls, South Dakota. *Amicus Curiae.*

RUDOLPH, *Judge.*

The question presented in this appeal is whether the enactment of subdivision (9) Ch. 91, Laws of 1949, was within the power of the legislature. This section of our law provides,

> "No license shall be issued to a nonresident for the hunting, taking or killing of any migratory waterfowl."

The trial court held the law valid. We agree with this holding.

The facts are without dispute. The defendant, a nonresident, was refused a license to hunt migratory waterfowl in this state and proceeded thereafter to hunt and kill a wild goose without such license. Defendant's acts were unlawful if the enactment of the above Ch. 91 (9), Laws of 1949 was within the power of the legislature.

Defendant makes two principal contentions in this court; 1st, that the legislative act violates the 1916 treaty made between the United States and Great Britain (39 U. S. Stat. at Large, 1702) and a similar treaty made in 1936 between the United States and Mexico (50 U. S. Stat. at Large, 1311); 2nd, that the act violates Article IV, Sec. 2, Constitution of the United States, which provides:

> "The citizens of each state shall be entitled to all of the privileges and immunities of citizens in the several states."

There is statistical knowledge and certain facts which are so well known in this jurisdiction that they are the subject of judicial notice. We wish to briefly refer to these facts before discussing defendant's contentions. In the years preceding this enactment by our legislature South Dakota was a Mecca for nonresident pheasant hunters. No state enjoyed the abundance of pheasants this state had in the decade commencing 1940. The state had a population of approximately 600,000. Yet in 1945 there were 97,980 nonresident hunting licenses issued in this state, and in the fall of 1946 preceding the legislative session which en-

acted the first act excluding nonresidents from hunting migratory waterfowl, 85,595 nonresident licenses were issued. We interpolate here to say that the language used by Mr. Justice Holmes regarding migratory waterfowl in the case of *Missouri* v. *Holland*, 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641 applies equally to the nonresident hunter who "yesterday had not arrived, to-morrow may be in another state, and in a week a thousand miles away." It was the pheasant that attracted hunters to South Dakota. To give some protection to the pheasant against this horde of hunters it was necessary to restrict the hours of hunting. The hours for pheasant hunting commenced at 12 noon, which left the nonresident pheasant hunter with idle time during the morning hours. As a result many of these nonresident pheasant hunters would spend the morning hours hunting ducks and geese. It was duck and goose hunting in the morning and pheasant hunting in the afternoon. These facts were all within the knowledge of the legislature when this legislation was enacted.

The treaties entered into with Great Britain and Mexico are obviously for the purpose of conserving migratory birds. The Convention with Great Britain provides that the two countries, "being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds * * * have resolved to adopt some uniform system * * *". The Convention with Mexico recites an identical purpose. To make effective these treaties Congress enacted the Migratory Bird Act. Secs. 703-711, Title 16 U. S. C. A. Sec. 708 of this Act provides:

> "Nothing in sections 703-711 of this title shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said conventions or of said sections, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open seasons for such birds beyond the dates approved by the President in accordance with section 704 of this title."

See also Regulation 12 adopted pursuant to Sec. 704, 1949 Cumulative Pocket Part, 16 U. S. C. A. page 118.

We find nothing in the treaties which makes absolute the right of nonresidents of South Dakota to hunt migratory birds in this state on the same basis as residents, and we believe it clear, that the treaties have no such purpose. The sole purpose of the treaties is to conserve migratory birds, and under the law and regulations enacted and promulgated pursuant to such treaties this state is at liberty to give migratory birds protection further than that given by the treaties and federal laws and regulations. We are of the view that the South Dakota law here under attack comes squarely within its authority to give "further protection to migratory birds." This law protects ducks and geese against a host of hunters who otherwise would be hunting these birds simply as an incident to pheasant hunting in South Dakota.

The right to take wild game has run the gantlet in the courts. Any attempted review of the many cases would not be helpful. Suffice to say is that originally it was held that a state had almost absolute power to regulate the taking and disposition of wild life within its borders. This holding was based upon the theory that ownership of fish or animals *ferae naturae* is in the state for the benefit of its inhabitants, and not subject to the privilege and immunities clause of the federal constitution. *Geer* v. *Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793; *James W. McCready* v. *Virginia*, 94 U. S. 391, 24 L. Ed. 248. In *Missouri* v. *Holland, supra*, wherein the Migratory Bird Treaty Act was upheld, Justice Holmes, speaking for a majority of the court, critically questioned the state ownership theory as applied to migratory birds when he said:

> "To put the claim of the state upon title is to lean upon a slender reed."

This statement has apparently influenced the later decisions of the court culminating in the cases of *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 92 L. Ed.

1478 and *Toomer* v. *Witsell*, 334 U. S. 385, 92 L. Ed. 1460. In the last cited case the court said:

> "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the state exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States."

Whether the holding in this case wipes out the whole ownership in the state theory we need not determine. Apart from the ownership theory there is another basis upon which a state may regulate the taking of wild game, including migratory birds. We, of course, refer to the exercise of the police power. While this power is not an absolute power, such as the power under the ownership theory, we nevertheless think it is an adequate basis upon which to justify the legislative act.

Acting under the police power the state may discriminate against citizens of other states provided there is substantial reason for the discrimination beyond the mere fact that they are citizens of other states. In the case of *Potsone* v. *Commonwealth of Pennsylvania*, 232 U. S. 138, 34 S. Ct. 281, 58 L. Ed. 539, Justice Holmes gave clear expression to the extent of this power by the following:

> "But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing

and go unpunished, if, as a matter of fact it is found that the danger is characteristic of the class named. * * * The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' ''

Chief Justice Vinson in the *Witsell* case gave summary expression to the same thought when he said with reference to the privileges and immunities clause, "* * * the purpose of that clause * * * is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed."

There is another applicable principle which finds expression in the cases above referred to, that is, that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

The local evil in South Dakota was apparent. Thousands of nonresident hunters, lured to South Dakota by an abundance of pheasants, were putting in their idle hours, and their time after getting their limit of pheasants, hunting ducks and geese. There was real danger that natural flyways and breeding ground and nursery for ducks and geese would be subject to excessive hunting and possible destruction. From experience we know that there would be no such influx of hunters except for the pheasant. Obviously the local resident who had his business or profession to occupy him was in entirely a different class from the nonresident hunter who was in South Dakota for the single purpose of hunting. The extent of duck or goose shooting by the resident was not increased or diminished to any appreciable extent by the excellent pheasant hunting. He was at home occupied with his daily tasks, hunting when he wished, but not shooting ducks or geese simply to occupy time that otherwise was not occupied. It is also a fact, too well known in South Dakota, that many nonresident hunters, not all, who have made the trip to this state perhaps at considerable expense are not satisfied unless they get their limit of everything the law allows. We conclude, therefore, that nonresidents constitute a pe-

culiar source of evil at which the statute was aimed. Whether the legislature could prescribe some other cure to meet the evil, to many is not an open question, but be that as it may, if there is to be any leeway left in the state to prescribe an appropriate cure we must conclude that the cure prescribed is appropriate and reasonable.

The above has been written on the assumption that hunting migratory waterfowl for sport is a privilege or immunity falling within the constitutional provision. However, this may well be doubted. To our knowledge it has never been so held. In the recent cases of *Toomer* v. *Witsell, supra,* and *Tokahashi* v. *Fish and Game Commission, supra,* the court placed special emphasis throughout the opinions upon the fact that commercial fishing was involved, and the result was to deny to the excluded class the right to make a living by fishing. The right to make a living is a right inherent in the individual, and as such no doubt protected by the constitutional provision. Hunting for sport with no commercial aspect attached seems to us to fall in an entirely different category. Involved only is a question of individual enjoyment, no property right is in issue nor is anyone denied the means of making a livelihood in competition with local citizens.

The trial court determined that the whole setup of our hunting laws and the eligibility for licenses thereunder is determined by residence and no requirement of citizenship is involved. Specifically the questioned statute refers only to nonresidents, there is no mention of citizenship. The reasoning of the trial court is persuasive, we quote:

> "Defendant's contentions of unconstitutionality assume that by this act the legislature has discriminated against the citizens of other states. Let us consider what the statutes does in fact say and mean. The prohibition is found in SDC 25.0306, as amended by Chap. 91, Laws of 1949, which provides that the issuance of hunting licenses shall be subject to the following restrictions: 1) No *resident* license shall be granted unless the applicant has been a bona fide resident of this state for at least six months prior to the making

of the application; 2) A *nonresident* or *visitor's* license shall be granted only to a person whose residence is not such as to qualify him for a resident license; 9) No license shall be issued to a nonresident for the hunting, taking or killing of any migratory waterfowl.

"It will be observed that the particular class of license to be issued, or whether any license whatever shall be issued is not dependent on citizenship. To be a citizen of South Dakota requires one year's residence, but any person who in good faith has resided in this state for six months is entitled to a resident license although he has not yet become a citizen of this state.

"Whether a citizen of the state who has not also been a resident thereof for six months next preceding is entitled to a nonresident license to shoot migratory birds depends on the construction to be given subd. (9). The source of this subd. (9) as it now appears in Chap. 91, Laws of 1949, is Chap. 109, Laws of 1947, which added a subd. (9) to the eight subdivisions of Chap. 106, Laws of 1941, which was itself an amendment of SDC 25.0306. The title of the 1947 act describes it as amending the existing statutes, and the act itself recites that the previous statutes shall 'be amended by adding a new subdivision number (9) reading as follows: "No license shall be issued to a nonresident for the hunting, killing or taking of any nonmigratory waterfowl." '

"Unless this term 'nonresident' takes a different meaning from the 1941 act to which it was annexed, it means one who does not reside in the state. A 'resident' is one who resides or dwells in a place for some time.

"If the term 'resident' is defined in the previous subdivisions of the act, it is in (1), (2), or (8). Subd. (1) limits resident licenses to bona fide residents of the state for at least six months, which by specifying a required period of residence and a good faith in its acquisition, necessarily assumes that there may be

'residence' in the absence thereof. Subd. (2) refers to a nonresident license as one to be granted where either good faith or period of residence is insufficient. Subd. (8) authorizes licenses to take fur-bearing animals to persons 'who shall have *lived* in the state at least six months.'

"None of these provisions seem to control the meaning of 'nonresidents' as that term appears in Subd. (9). Vol. 5, Words and Phrases, Perm. Ed., defines 'domicile' as a matter of intention, but says, 'residence' is a physical fact, while 'bona fide residence' means residence with domiciliary intent.

"The legislature doubtless intended to exclude from migratory waterfowl shooting those who are not bona fide residents for the six months next preceding application. Whether this statute accomplishes that result need not concern us here, and I shall assume that the act has the effect of denying such right to nonresidents, including nonresident citizens of the state.

"The statute then must be construed by its own expressed terms as applying no test of citizenship, but as dealing with citizens of South Dakota and the other states alike."

Number 9168

The judgment appealed from is affirmed.
Smith and Sickel, JJ., concur.
Hayes, P. J., and Roberts, J., concur in result.